United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-1375

To be argued by
ALAN LEVINE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No 77-1375

B
P/S

UNITED STATES OF AMERICA,
Appellee,

—v.—

NICHOLAS PANTAZ,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
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Assistant United States Attorneys, Of Counsel.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1375

UNITED STATES OF AMERICA,

Appellee,

—v.—

NICHOLAS PANTAZ,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Nicholas Pantaz, a/k/a Nicholas Pantazopoulos, appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on July 27, 1977, after a three day jury trial before the Honorable Edward Weinfeld, United States District Judge.

Indictment S 77 Cr. 458, filed July 21, 1977, charged Pantaz, George Ford, Hans Hartung, and Laurie Nicosia with five counts of violating the federal narcotics laws.*

* The original indictment, 77 Cr. 458, was filed on June 17, 1977. A fifth person, Carl Argila, a/k/a "Carlie," was named in all five counts of the original indictment as a defendant, but was named only as a co-conspirator in Count One of the superseding indictment. Argila subsequently was reindicted in a second superseding indictment, S 77 Cr. 458, filed July 28, 1977, and tried alone on these same charges. Argila was convicted on August 5, 1977 after a four day jury trial before Judge Weinfeld.

Count One charged all defendants with conspiracy to possess with intent to distribute and to distribute methamphetamine; Count Two charged Hartung and Nicosia with the distribution and possession with intent to distribute of approximately 14.17 grams of methamphetamine on April 7, 1977; and Count Three charged Pantaz, Ford, Hartung, and Nicosia with the distribution and possession with intent to distribute of approximately 111.64 grams of methamphetamine on April 12, 1977, in violation, respectively, of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B). Counts Four and Five charged all four defendants with the distribution and possession with intent to distribute of approximately 223.58 and 407.92 grams respectively, of methamphetamine on April 22, 1977, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B).

Trial commenced as to all defendants but Nicosia * on July 25, 1977, and concluded on July 27, 1977, when the jury returned guilty verdicts against Pantaz, Ford and Hartung on all counts.** On August 18, 1977, Judge Weinfeld sentenced Pantaz to concurrent terms of one year imprisonment and three years' special parole, on Counts One, Four and Five.***

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* Nicosia pleaded guilty to Counts One and Four prior to trial.

** Judge Weinfeld dismissed Count Three against Pantaz at the close of the Government's case.

*** Ford was sentenced concurrently on Counts One, Three, Four and Five to eighteen months' imprisonment, with all but six months suspended, three years' probation and three years' special parole. Hartung was sentenced concurrently on Counts One through Five to eighteen months' imprisonment, with all but six months suspended, three years' probation and three years' special parole. Neither Ford, nor Hartung has appealed his conviction.

Nicosia was sentenced concurrently on Counts One and Four to eighteen months' imprisonment, with all but three months suspended, three years' probation and three years' special parole.

Pantaz presently is at liberty on bail pending this appeal.

Statement of Facts

The Government's Case

On April 6, 1977, an informant introduced Laurie Nicosia to Joseph Sullivan, a Special Agent with the Drug Enforcement Administration who was then acting in an undercover capacity, for the purpose of selling methamphetamine. (Tr. 28, 73).* In this introductory conversation, arrangements were made for Agent Sullivan to purchase a sample of drugs from Nicosia on the following day in Manhattan. (Tr. 29). The next day at noon, as scheduled, Agent Sullivan met Nicosia and her common law husband, Hans Hartung, at the Market Diner, 43rd Street and Eleventh Avenue to consummate the first transaction. (Tr. 31-32). Following some initial conversation, Nicosia left the diner to speak with someone outside. (Tr. 35-36). Upon her return shortly later, Nicosia delivered three-quarters of an ounce of methamphetamine for which Sullivan paid her $1,600 in official advance funds. (GX 3, 3a; Tr. 36-37, 222).

Sullivan later proceeded to examine the sample and, after determining that it was "satisfactory," the agent spoke with Nicosia the same evening about purchasing four ounces of methamphetamine for $6,400. (Tr. 42). The next day, Nicosia insisted on a higher price of $7,500 and advised Sullivan that the methamphetamine was from an "out-of-town source." (GX 1, 1A).** Several

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* References to the trial transcript are cited as "Tr."; "GX" refers to Government Exhibits received at trial.

** Nicosia's conversation with Agent Sullivan on April 8, 1977 was tape-recorded by the agent. This tape, GX 1, was introduced in evidence and played for the jury.

days later, Sullivan agreed to meet the $7,500 price and made plans to meet Nicosia and Hartung in the vicinity of East Tremont and Randall Avenues, Bronx, New York. (Tr. 46).

On April 12, 1977, the planned meeting among Sullivan, Nicosia and Hartung took place at the intersection of East Tremont and Randall Avenues. Upon assembling, all three proceeded to the vicinity of the residence of George Ford at 530 Calhoun Avenue. (Tr. 49-50). Nicosia took the $7,500 purchase money that had been handed to her by Sullivan and brought the cash into Ford's residence. Nicosia returned outside in a few minutes, but without the promised methamphetamine. (Tr. 52). She explained that the "out-of-town source" was delayed at the airport. Nicosia, Hartung and Sullivan then left Ford's house, returning to the intersection. (Tr. 52).

Later that day, the three returned to Calhoun Avenue. Nicosia entered Ford's residence once again. Several minutes later, Nicosia returned to Sullivan's automobile and immediately delivered four ounces of methamphetamine. (GX 4; Tr. 54-55, 95-96, 143-44, 223). Sullivan then drove away, while Nicosia and Hartung went back into Ford's residence. Approximately fifteen minutes later, Nicosia, Hartung and Ford were observed leaving 530 Calhoun Avenue with Nicholas Pantaz, the out-of-town source earlier referred to by Nicosia.* (Tr. 97-100, 144-46).

In the ensuing ten days, negotiations proceeded for the sale of "elbows"—pound quantities—of methampheta-

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* GX 14, received in evidence, was a United Airlines ticket for "N. Pantaz," for Flight 904 from O'Hare Airport, Chicago to LaGuardia Airport, New York on April 12, 1977. Flight 904 arrived at LaGuardia Airport that day.

mines from Pantaz, the out-of-state source. In Nicosia's conversations with Agent Sullivan, all of which were recorded, she told Sullivan that the date of the transaction had to be coordinated around Pantaz' travel plans and Ford's work schedule. (GX 2, 2a, 2b and 2c). A price of $6,900 per quarter pound of methamphetamine was set. (GX 2, 2b). Telephone toll records of the residences of Ford, Pantaz, Nicosia and Argila demonstrated heightened activity among defendants, including Pantaz, during this period. (GX 15-20).* Arrangements finally were made between Nicosia, Hartung and Sullivan for the sale of one and one-quarter pound of methamphetamine on April 22, 1977 in the Bronx, near Ford's residence. (GX 2, 2d).

On the morning of April 22, 1977, Nicosia and Hartung met Sullivan, who was also accompanied by undercover agent Petrucci, at the East Tremont and Randall Avenues intersection. According to plans, all four then were to proceed to Ford's residence. (Tr. 64-65). Nicosia told Sullivan and Petrucci that the "guy from out-of-state" had twenty ounces ready for a price of $34,500, and once the money was delivered, she would obtain the methamphetamine from Ford's residence. (Tr. 65-66). Agent Petrucci, however, refused to "front" the money; consequently it was agreed to undertake the transaction in stages. (Tr. 67, 116-17). Upon seeing the $35,000 displayed by Sullivan, Nicosia and Hartung drove away to Ford's residence at 530 Calhoun Avenue. (Tr. 67, 99, 118, and 148).

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* Based on the telephone toll records of Ford, Pantaz, Nicosia and Argila for the relevant period (GX 15-20), the Government prepared chronological charts, received in evidence, of all telephone calls made between these telephone numbers from April 1 through April 22, 1977. (GX 21-23).

Approximately ten minutes after entering 530 Calhoun Avenue, Nicosia and Hartung departed with Pantaz, and all returned to the East Tremont and Randall Avenues intersection. (Tr. 70, 99 and 149). Nicosia got into Sullivan's car and delivered approximately one-half pound of methamphetamine. (GX 5; Tr. 70-71, 120, 224-25).

On signal Nicosia, Hartung and Pantaz were arrested.* (Tr. 72, 121, 149). Following the arrest, an airplane ticket receipt was recovered from Pantaz' pocket. (GX 8; Tr. 151). A subsequent search of Pantaz' person at Drug Enforcement Administration headquarters revealed an atomizer containing a sample of methamphetamine and an address book. (GX 12, 13; Tr. 210, 225). Later that day, pursuant to a search warrant obtained for Ford's residence at 530 Calhoun Avenue, approximately 336.09 grams of methamphetamine were recovered in the living room in a black valise which had the name "Nicholas" imprinted on the outside. (GX 26, 27; Tr. 186-88, 227).** A Trans World Airlines boarding pass and ticket receipt in the name "N. Pantaz" for a Chicago to New York flight on April 22, 1977--the day of the last deal—also were found in the valise. (GX 26a; 187).

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* Following radio communication, Ford was arrested by other agents at his residence. (Tr. 100, 186). A later search of Ford's person turned up a piece of paper with the name "Nicholas Peter Pantaz" and two Illinois addresses and a telephone number. (GX 7). The telephone number at one of the respective addresses was used by co-defendant Ford. See *supra*, at 5 n*.

** Approximately 75.83 grams of methamphetamine were found in the kitchen refrigerator in Ford's residence (GX 28; Tr. 188, 228) and three $50 bills whose serial numbers matched those of official advance funds used by Agent Sullivan to purchase the four ounces of methamphetamine on April 12, 1977 were found on a china closet in the living room. (GX 10; Tr. 47, 100-01, 203-04).

Defendant's Case

Pantaz presented no evidence.

ARGUMENT

POINT I

The District Court Properly Found That There Was Sufficient Independent Evidence of Pantaz' Membership in the Conspiracy To Allow Consideration of Nicosia's Hearsay Statements Against Defendant.

Pantaz' essential claim on this appeal is that there was insufficient independent proof of his participation in the conspiracy to allow the jury to consider the otherwise hearsay statements of his co-defendant Nicosia. In brief, defendant claims that Judge Weinfeld erred in permitting the jury to consider all of the evidence adduced at trial that overwhelmingly showed Pantaz' membership in the narcotics conspiracy.

It is, of course, settled law that once a defendant's membership in a conspiracy has been proven to the satisfaction of the trial judge by a fair preponderance of the non-hearsay evidence, the hearsay declarations of co-conspirators, in furtherance of the conspiracy, are admissible against the defendant. *Lutwak* v. *United States*, 344 U.S. 604 (1935); *United States* v. *Daley*, Dkt. No. 77-1262, slip op. 109, 120 (2d Cir., October 20, 1977); *United States* v. *Glazer*, 532 F.2d 224 (2d Cir. 1976); *United States* v. *Geaney*, 417 F.2d 116, 1120 (2d Cir. 1969), *cert denied sub nom. Lynch* v. *United States*, 397 U.S. 1028 (1970); *United States* v. *Ragland*, 375 F.2d 471, 476-77 (2d Cir. 1967), *cert. denied*, 390 U.S. 925

(1968); Fed. R. Evid. 801(d)(2)(D), (E). An analysis of the evidence in this case makes plain that the Government satisfied this burden.

Pantaz was present on both April 12 and 22, 1977, when narcotics transactions occurred. As shown by airplane tickets in his name, on each date Pantaz had traveled the substantial distance from Chicago to New York to be present at the meetings. On the occasion of the April 12th sale, the delivery of the methamphetamines was postponed from the time originally scheduled, until immediately preceding the time Pantaz was first seen by the agents in the presence of Ford, Hartung and Nicosia leaving 530 Calhoun Avenue. On April 22, 1977, Nicosia again was unable to consummate the deal until Pantaz first appeared at her meeting with agents Sullivan and Petrucci. Thus, the record clearly showed circumstantially that Pantaz' presence, by itself, was critical to trigger completion of the negotiated methamphetamine sales. The chronology of these events, when combined with the fact that Pantaz had journeyed thousands of miles to be present in New York City for the sales, was more than sufficient to establish that his presence was purposeful and an essential part of the ongoing conspiracy.

Moreover, in determining the significance of Pantaz' own actions and the context in which they occurred, Judge Weinfeld was entitled to consider that on April 12th Nicosia earlier had advised the agents that the out-of-town source had not yet arrived, thereby causing a delay in the sale. This statement, of course, added particular meaning to Pantaz' subsequent arrival, at which time the sale was consummated, *United States* v. *Stanchich*, 550 F.2d 1294 (2d Cir. 1977); *United States* v.

*Geaney, supra,** and, in any event, was an independently admissible verbal act and therefore not hearsay. *United States* v. *Stanchich, supra; United States* v. *Wiley*, 519 F.2d 1348, 1350 (2d Cir. 1975); *United States* v. *D'Amato*, 493 F.2d 359, 363-64 (2d Cir. 1974); *United States* v. *Glasser*, 443 F.2d 994, 999 (2d Cir.), *cert. denied*, 404 U.S. 854 (1971).**

Finally, any possible question as to the sufficiency of the independent evidence of Pantaz' participation in the conspiracy is rendered specious by the subsequent discovery of the additional shipment of methamphetamines in Pantaz' own valise, located in Ford's residence.***

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* This Court regularly has observed that "pieces of evidence must be viewed not in isolation but in conjunction." *United States* v. *Geaney, supra*, 417 F.2d at 1121. Thus, to focus upon the significance of Pantaz' presence on April 12th it is appropriate to consider in context that the deal could not proceed earlier because, as Nicosia advised, the out-of-town source had been delayed at the airport. This view of Nicosia's statement is consistent with the application of the *Geaney* rule in *Stanchich, supra*, 550 F.2d at 1200—where this Court took note of the chain of events surrounding Stanchich's actions, including a telephone call among conspirators to discuss the deal—and in *Geaney* itself—where the Court considered important the fact that Geaney's boat ride paralleled the precise escape route planned by his confederates. 417 F.2d at 1120. *Cf. United States* v. *Martorano*, Dkt. No. 76-1372 (1st Cir., August 24, 1977).

** Nicosia's statement that the deal could not proceed, followed immediately by the dispersing of the then-gathered participants, was a classic "verbal act" which both explained the deal's temporary collapse, and its subsequent success when Pantaz arrived.

*** Defendant argues, without any supporting authority, that independent evidence obtained after his arrest cannot be considered to meet the *Geaney* standard. This contention, while novel, plainly is frivolous. The evidence complained of does not relate to post-conspiratorial actions, but merely is proof of the conspiracy itself that the Government first obtained after the conspiracy had been exposed.

Pantaz' possession of the very drug then being delivered—as well as his personal possession of an atomizer also containing methamphetamines—soundly refuted any contention that he was merely or coincidentally present when the two narcotics deals occurred, and by itself warranted the conclusion that he was a member of the conspiracy.*

In sum, viewed together, the direct and circumstantial evidence independently demonstrated that Pantaz was the out-of-town source repeatedly referred to by his co-conspirator Nicosia, and more than amply warranted Judge Weinfeld's conclusion that the jury could consider the hearsay statements of Pantaz' co-conspirators. *United States* v. *Stanchich, supra; United States* v. *Manfredi*, 488 F.2d 588, 596-97 (2d Cir. 1973). *See also, United States* v. *Head*, 546 F.2d 6, 10 (2d Cir. 1976).

POINT II

The Agents Had Probable Cause To Arrest Pantaz on April 22, 1977.

Pantaz claims that notwithstanding his presence at the scene of the second narcotics deal on April 22, 1977, and his earlier involvement on April 12, 1977, the DEA agents lacked probable cause to arrest him on April 22, 1977.

It is clear that at the moment of Pantaz' arrest the agents had knowledge of sufficient facts and circumstances "to warrant a prudent man in believing that the [de-

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* Moreover, there was additional circumstantial proof of Pantaz' membership in the conspiracy from the telephone toll records which reflected heightened activity between Ford, in New York, and Pantaz, in Chicago, during the negotiation stages of their illegal dealings.

fendant] had committed or was committing an offense." *Beck* v. *Ohio*, 379 U.S. 89, 91 (1974); *United States* v. *DeLeon*, Dkt. No. 77-1211, slip op. 5267, 5270 (2d Cir. August 12, 1977); *United States ex rel. LaBelle* v. *LaVallee*, 517 F.2d 750, 754 (2d Cir. 1975), *cert. denied*, 423 U.S. 1062 (1976). The agents knew collectively that Pantaz had been observed at each of the two methamphetamine transactions under circumstances which made it plain that he was the out-of-town source mentioned by Nicosia as the supplier of the drugs. Moreover, they had available and could consider on the issue of probable cause, the statements of Pantaz' co-conspirators which directly implicated him. *United States* v. *Jackson*, 560 F.2d 112 (2d Cir. 1977); *United States* v. *Rueda*, 549 F.2d 865 (2d Cir. 1977). Consideration of all of this information unquestionably justified the belief that Pantaz was involved in the conspiracy. *United States* v. *DeLeon*, *supra*.

Indeed, similar fact patterns consistently have been viewed by the courts to constitute probable cause for an arrest, rather than mere suspicion sufficient to justify only an investigative stop. *United States* v. *Skinner*, 412 F.2d 98, 101-02 (8th Cir.), *cert. denied*, 396 U.S. 967 (1969); *United States* v. *Fay*, 240 F. Supp. 591, 595 (S.D.N.Y. 1965), *cert. denied*, 384 U.S. 964 (1966). See, *United States ex rel. Hollman* v. *Rundle*, 461 F.2d 758, 759 (2d Cir. 1972).*

Thus, under any proper view of the record it is clear that Judge Weinfeld's refusal to suppress the limited

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* Since Pantaz was at the "scene of the crime," defendant's claim is misguided that the arrest was based on mere association with known narcotic dealers sometime after a crime was committed. Compare *United States* v. *DeLeon*, *supra*, with *United States* v. *Rosario*, 543 F.2d 6, 8-9 (2d Cir. 1976).

evidence obtained from Pantaz' arrest, was correct and proper.*

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

ALAN LEVINE,
ROBERT J. JOSSEN,
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* The only evidence directly seized from Pantaz' arrest was the atomizer containing a sample of methamphetamine, an address book and one airplane ticket. This evidence, while obviously probative of Pantaz' guilt, hardly was of great significance in the context of the overall proof against the defendant. Cf. *United States* v. *Berenguer*, Dkt. No. 77-1220, slip op. 6093, 6101 (2d Cir., September 22, 1977).

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) ss.:
COUNTY OF NEW YORK)

~~ALAN LEVINE~~ ALAN being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 14th day of November, 1977, he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Joseph Stone, Esq.
277 Broadway
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And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Alan Levine

Sworn to before me this
14th day of November, 1977

Elizabeth A. McKeever

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